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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LIN OUYANG, Plaintiff and Appellant, v. ACHEM INDUSTRY AMERICA, INC., Defendant and Respondent.	B290915 (Los Angeles County Super. Ct. No. BC556293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Lin Ouyang, in pro. per., for Plaintiff and Appellant.

Law Office of Ray Hsu & Associates, Ray Hsu and May T. To, for Defendant and Respondent.

INTRODUCTION

This appeal is from the second of two lawsuits filed by appellant Ouyang against her former employer, respondent Achem Industry America, Inc. (Achem). Ouyang's first suit, based on actions taken while she was employed by Achem, was tried to a jury and resulted in a defense verdict and an award of costs to Achem. In this, her second suit, she alleged six causes of action relating to Achem's alleged failure to increase her hourly wage, reimburse her for certain expenses she incurred in obtaining a green card, or pay for her health insurance while she was on unpaid leave. Her first four causes of action were disposed of when the trial court sustained Achem's demurrer without leave to amend and thereafter granted Achem's motion for judgment on the pleadings when Ouyang reasserted the same causes of action. Her fifth and sixth causes of action were disposed of following this court's directive to the trial court to grant summary judgment to Achem on the basis of preemption under the Employee Retirement Income Security Act (ERISA).

On appeal, Ouyang contends the trial court erred in sustaining the demurrer without leave to amend -- and thereafter granting Achem judgment on the pleadings -- as to her first three causes of action.[1] Additionally, Ouyang contends the trial court erred in denying her motion for

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[1] Ouyang asserts no error regarding the sustaining of the demurrer or the grant of judgment on the pleadings as to her fourth cause of action.

sanctions, based on Achem's filing a motion for leave to file a cross-complaint asserting offset in the amount of costs awarded Achem in the first lawsuit, and in denying her motion to strike the offset defense. She further assigns error to the trial court's failure to rule on her objections to Achem's proposed judgment or to issue a statement of decision before issuing its final judgment. Finally, Ouyang urges us to revisit our prior decision ordering the trial court to grant summary judgment as to her fifth and sixth causes of action. Finding no error, we affirm.

STATEMENT OF RELEVANT FACTS

A. *The First Action*

In August 2011, Ouyang filed a complaint against Achem alleging 11 causes of action relating to Labor Code violations, intentional infliction of emotional distress, breach of contract, fraud, and unfair business practices (the First Action). In October 2014, a jury returned a verdict against Ouyang on all causes of action. Ouyang was further ordered to pay Achem $63,180.04 in costs. Ouyang appealed, and we affirmed in *Ouyang v. Achem Indus. Am.* (Jun. 28, 2019, B261929) [nonpub. opn.]. In September 2019, our Supreme Court denied review and we issued a remittitur. In April 2020, the United States Supreme Court denied certiorari.

B. *The Current Action*

1. The Original Complaint

On August 29, 2014, Ouyang filed a verified complaint against Achem alleging six causes of action: (1) fraud; (2) national origin discrimination under the Fair Employment and Housing Act (FEHA); (3) wrongful constructive termination; (4) violation of Labor Code sections 2926, 2927, 223, 201, and 202; (5) breach of contract; and (6) "preventing subsequent employment by misrepresentation." In January 2015, Achem demurred to Ouyang's complaint arguing, among other things, that the statute of limitations barred the first four causes of action. Achem also argued the constructive termination cause of action failed to state facts sufficient to constitute a cause of action. The court sustained Achem's demurrer but granted Ouyang leave to amend.

2. The First Amended Complaint

In March 2015, Ouyang filed a verified first amended complaint. The first five causes of action remained the same, but the sixth was replaced by "fraud," alleging Achem falsely promised to pay for Ouyang's health insurance while she was on unpaid leave. As relevant to this appeal, she alleged:

–Ouyang worked for Achem from December 2002 to November 2013. In 2005 she sought a higher-paying job, but Achem induced her to stay by

promising her a wage increase after she received a green card. Achem asked her to prepay the attorneys' fees and costs needed to apply for a green card, but promised Achem would reimburse her for these expenses after she obtained it.

–In July 2008, when she was about to receive her green card, Ouyang asked Achem's president to pay her the promised wage, but he stated it was "a difficult time" and did not. When she asked a few months later to be reimbursed for her attorneys' fees, he told her it was not the "right time" to do so. At the time, Achem's parent company had been delisted from the stock exchange.

–In September 2009, she again asked Achem's president to increase her wage and reimburse her for the attorneys' fees; he again told her to wait, because someone new would be "tak[ing] over" Achem in a few months. Ouyang renewed the request in early 2010 and was told to ask the general manager. The general manager stated he no longer had the authority to approve the reimbursement, but did not say that Achem did not intend to pay, and Ouyang alleged she believed this meant she needed to speak with new management to be reimbursed.

–In September 2010, after Achem's parent company had been relisted on the stock exchange, Ouyang insisted Achem pay her the promised wage and threatened to sue. In

response, Achem accused Ouyang of not doing her job, and threatened to revoke her green card and to fire her if she sued. Achem's general manager also told her "some talents were willing to take low paid job due [to] their immigration status." Ouyang, who was from China, was aware that similarly situated employees from Taiwan were being paid the prevailing wage.

–Ouyang protested this discrimination, and Achem responded by cutting her workload significantly and harassing her, causing her to be injured both mentally and physically, and necessitating a two-week sick leave.

–In November 2010, Ouyang filed a workers' compensation claim. In January 2011, she received her first negative performance review and three days later Achem placed her on unpaid leave.

–In February 2014, Ouyang filed a complaint with the Department of Fair Employment and Housing for national origin discrimination and obtained a right-to-sue letter.

Achem demurred again, arguing that several of Ouyang's causes of action were time-barred. In sustaining the demurrer to the first four causes of action without leave to amend, the court found Ouyang "was on inquiry notice by early 2010 that Achem did not intend to reimburse her for the attorneys' fees she spent on her immigration petition"

and "the 'last illegal act' alleged [relating to her FEHA cause of action] occurred in January 2011." The court additionally noted the third cause of action for constructive termination failed to state facts sufficient to constitute a cause of action because Ouyang failed to allege facts demonstrating her working conditions "were so intolerable as to require a reasonable person to resign." The court also sustained Achem's demurrer to the fifth and sixth causes of action relating to Ouyang's claim that Achem had promised to pay for her health insurance while she was on unpaid leave, but granted Ouyang leave to amend.

3. The Operative Second Amended Complaint

In June 2015, Ouyang filed a verified second amended complaint, containing the first four causes of action to which Achem had already successfully demurred, and two causes of action for fraud and breach of contract relating to Achem's alleged promise to pay for her health insurance after she was placed on unpaid leave. Ouyang's fifth cause of action for fraud sought monetary damages to reimburse her for medical expenses she incurred, as well as compensation for "sever[e] emotional distress." Her sixth cause of action for breach of contract sought monetary damages for the same out-of-pocket medical expenses.

In answering the second amended complaint, Achem noted that "[b]ecause the Court has sustained Defendant's Demurrers to the First, Second, Third and Fourth Causes of

Action, which has the same effect as the granting of a motion for judgment on the pleadings as to these causes of action, Defendant is not required to respond to the allegations in the First, Second, Third and Fourth Causes of Action of the" second amended complaint. Achem further asserted ERISA preemption as an affirmative defense to the fifth and sixth causes of action.

4. Achem Moves for Judgment on the Pleadings and Leave to File a Cross-Complaint; Ouyang Moves for Sanctions

In September 2016, Achem moved for judgment on the pleadings on the first five causes of action. It also moved for leave to file a cross-complaint to assert an offset claim against Ouyang, asking that any amount awarded to Ouyang in the current action be offset by the judgment it had obtained in the First Action. In response, Ouyang moved for sanctions under Code of Civil Procedure section 128.5, arguing that both motions were frivolous. Of relevance to this appeal, Ouyang argued Achem's motion for leave to file a cross-complaint was frivolous because any amount awarded to her in the instant action would be exempt from collection, and therefore Achem's request to offset that amount constituted an illegal request to circumvent the exemption statutes. Ouyang also claimed to be indigent, and asserted she had received a waiver of filing fees.

In October 2016, the court granted Achem's motion for judgment on the pleadings as to the first four causes of action, but denied it as to the fifth cause of action. It also granted Achem's motion to file a cross-complaint. Achem filed its cross-complaint on October 24, 2016, but the court struck it three days later. The court then reversed its earlier ruling and denied Achem's motion to file a cross-complaint. In the order denying Ouyang's motion for sanctions, the court found that while Achem's cross-complaint was unnecessary -- noting the proper way to obtain an offset was to file an answer pleading offset -- "it was not filed entirely without purpose." The court additionally pointed out that it had initially granted Achem's motion for leave to file a cross-complaint, and it would be unjust to sanction Achem for filing a motion the court had granted. With the court's permission, Achem filed an amended answer, asserting both ERISA preemption and offset as affirmative defenses. The court denied Ouyang's request to strike the offset affirmative defense.

5. Motion for Summary Judgment

In February 2017, Achem moved for summary judgment on Ouyang's second amended complaint, arguing that: (a) its health insurance plan constituted an Employee Welfare Benefit Plan governed by ERISA; and (b) Ouyang's fifth and sixth causes of action -- the only causes of action remaining -- were related to that plan, and therefore

preempted by ERISA. In May 2017, the court denied the motion.

Achem petitioned this court for a writ of mandate and following briefing by both parties, we issued an opinion finding both causes of action preempted by ERISA and directing the trial court to vacate its order denying Achem's motion for summary judgment and enter a new order granting it. We also awarded Achem its costs. After we denied Ouyang's petition for rehearing, and our Supreme Court denied her petition for review, we issued a remittitur in December 2017.

6. Judgment

Achem submitted a proposed judgment in May 2018 and Ouyang objected. Among other arguments, she asserted that by finding her fraud and breach of contract causes of action preempted by ERISA, we "necessarily determined that plaintiff had stated facts creating an estoppel to set up the defense that Achem's false representation of plaintiff's employment status, relied on by the plaintiff, induced the belated filing of the wrongful termination and discrimination causes of action." She further argued the court "should exercise its equity power to bar Achem from asserting [a] statute of limitation[s] defense [citation], because Achem admitted in its verified answer that Achem represented to plaintiff that she was expected to return to Achem while she was on unpaid leave and admitted plaintiff believed that she was still employed by Achem as of November 2013." Ouyang

also requested the court "issue a statement of decision explaining the factual and legal basis for its decision."

The court did not issue a statement of decision or explicitly rule on Ouyang's objections. Instead, in June 2018, after correcting a typographical error, the court signed the proposed judgment Achem had submitted, entering judgment in favor of Achem and against Ouyang. Achem was awarded $945 in costs for the writ of mandate proceedings, as well as costs of suit for the trial court proceedings. Ouyang timely appealed.

DISCUSSION

A. *The Court Did Not Err in Sustaining the Demurrer Without Leave to Amend*

As noted, the court sustained Achem's demurrer to Ouyang's first four causes of action without leave to amend, finding the causes of action were barred by the statute of limitations, failed to state a claim, or both. Ouyang challenges those rulings as to the first three causes of action only. "We review a ruling sustaining a demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. [Citation.] 'We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons.'" (*Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 289.) When a demurrer is sustained without leave to amend, "we decide

whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

1. First Cause of Action for Fraud

In Ouyang's first cause of action, she alleged that Achem falsely promised to reimburse her for the attorneys' fees she incurred in obtaining a green card, and to increase her hourly wage once she obtained a green card. However, she alleged that she requested this reimbursement and wage increase several times, only to be denied each time. Specifically, when she was about to receive her green card in July 2008, she asked Achem to increase her hourly wage; Achem's president responded that this was a "difficult time" and did not increase her wage. When she asked a few months later to be reimbursed for her attorneys' fees, he told her this was not the right time. A year later, in September 2009, she again asked Achem's president to increase her wage and reimburse her for the attorneys' fees; he again told her to wait, because someone new would be "tak[ing] over" Achem in a few months. Ouyang renewed the request in early 2010 and was told to ask the general manager. The general manager stated he no longer had the authority to approve the reimbursement, but did not say that Achem did not intend to pay, and Ouyang alleged she believed this

meant she needed to speak with new management to be reimbursed.

In sustaining the demurrer to this cause of action, the court found Ouyang "was on inquiry notice by early 2010 that Achem did not intend to reimburse her for the attorneys' fees she spent on her immigration petition . . . ." Accordingly, her claim -- filed in August 2014 -- was barred by the statute of limitations.[2] On appeal, Ouyang argues the court erred because: (a) her fraud cause of action "relate[d] back to a timely filed original complaint" in the First Action; (b) Achem failed to allege it would be prejudiced by permitting this cause of action; (c) she was not on inquiry notice by early 2010; and (d) she could cure the defects of this cause of action through amendment. We disagree.

First, "[t]he relation back doctrine allows a court to deem an amended complaint filed at the time of an earlier complaint if both complaints rest on the same general set of facts, involve the same injury, and refer to the same instrumentality." (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 60.) But the "earlier complaint" must be filed in the same action. Ouyang presents no authority permitting a new complaint to "relate[] back" to a complaint filed in a different action. When an appellant fails to provide the appellate court with applicable case authority to support

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[2] The "'statute of limitations for fraud is three years.'" (*Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733.)

an argument, that argument is forfeited. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.)

Second, "no California decision requires a showing of prejudice to enforce a statute of limitations." (*State Farm Fire & Casualty Co. v. Superior Court* (1989) 210 Cal.App.3d 604, 612.) Ouyang presents no authority to the contrary.

Third, Ouyang argues the court erred in finding she was on inquiry notice in early 2010 because she alleged the general manager stated he had no authority to approve reimbursement, not that Achem was refusing to reimburse her. Ouyang misunderstands "inquiry notice." "Inquiry notice" does not occur when a plaintiff knows she has been injured. "Inquiry notice" occurs when a person has """"notice or information of circumstances to put a reasonable person *on inquiry*""""" that she has suffered an injury. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 398.) "[T]he limitations period begins to run when the circumstances are sufficient to raise a suspicion of wrongdoing, i.e., when a plaintiff has notice or information of circumstances sufficient to put a reasonable person on inquiry." (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 648.) Here, Ouyang requested Achem increase her hourly wage and reimburse her for attorneys' fees three times in three years. Each time she was put off; Achem never provided a date when the increase or reimbursement would occur, or informed Ouyang of some procedure she could follow to get those expenses reimbursed. We agree with the trial court that a reasonable person would have been on inquiry by early 2010.

Finally, Ouyang argues she could amend this cause of action by alleging Achem falsely promised her that she would be reimbursed to "avoid liability of paying required wage . . . ." Further allegations that Achem intentionally deceived her would not fix the fundamental defect that Achem's actions would have caused a reasonable person to be on inquiry by early 2010.

2. Second Cause of Action for FEHA Discrimination

Ouyang's second cause of action alleged Achem discriminated against her both because she was from China, and because she opposed Achem's allegedly illegal practices. The court sustained Achem's demurrer to this cause of action finding "the 'last illegal act' alleged occurred in January 2011." The statute of limitations for a FEHA claim was one year when Achem's demurrer was sustained. (Former Gov. Code, § 12960, subd. (d), effective January 1, 2006 ["No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred"].)

Ouyang argues her FEHA cause of action "is not barred by the statute of limitation[s] under the delayed discovery rule and the doctrine of equitable estoppel, because . . . Richard Du ('Du') fraudulently concealed the fact that he refused to increase Ouyang's wage because she was from China, [and] he misrepresented to Ouyang that the reason was that he needed to investigate Ouyang's job duties."

Ouyang claims she did not learn the real reason she was denied a wage increase until Du testified at trial in the First Action on October 10, 2014, that he already knew her job duties. She also argues that this testimony, coupled with the alleged lie that he needed to investigate her job duties, estopped Achem from asserting the statute of limitations.

First, the discovery rule does not apply to a FEHA cause of action. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 88-89, 92-93 [though plaintiff did not discover discriminatory reason behind decision not to hire him until it was too late to timely file an administrative claim, his FEHA claim was still time-barred under Government Code section 12960].)

Second, even if the discovery rule applied, Ouyang herself alleged that in September 2010 she asked Du for the "prevailing wage" and was told that "some talents were willing to accept low paid job due to their immigration status"; she further acknowledged being aware that similarly situated employees from Taiwan were paid the prevailing wage while she was not. She therefore "protested discrimination" to Du and threatened to sue for wages owed. Moreover, Ouyang's initial verified complaint filed on August 29, 2014, contained a cause of action for "National Origin Discrimination, Hostile Work Environment Harassment and Retaliation – FEHA." The allegations in the verified original complaint for this cause of action were substantively identical to those in the verified second amended complaint. Her claim that she did not discover she

suffered national origin discrimination until October 10, 2014 -- six weeks after she filed the original verified complaint claiming national origin discrimination -- is belied by the record.

Third, even if Ouyang could assert estoppel in the face of the express language of *Williams* and Government Code section 12960 -- a proposition for which Ouyang presents no authority -- the allegations in her second amended complaint did not demonstrate estoppel. If a defendant acts in such a way to wrongfully induce a plaintiff to believe her claim will be amicably resolved and causes her not to file suit, this may create an estoppel against pleading the statute of limitations. (See, e.g., *Industrial Indem. Co. v. Industrial Acc. Com.* (1953) 115 Cal.App.2d 684, 690.) Here, however, Ouyang alleged she protested discrimination and threatened to sue in September 2010. She contended Achem responded by accusing her of not performing her job duties, threatening to revoke her green card, telling her she would be fired if she sued, and subjecting her to other harassment. Achem did not act in a manner that could have led Ouyang to believe her claims would be amicably resolved.

Finally, Ouyang argues she could cure the defect by amending to allege she did not discover the impermissible bias until October 2014. Such an amendment would be futile, both because the discovery rule does not apply, and because this would be a sham pleading: by her own admission, Ouyang "protested discrimination" in 2010, and alleged it as a cause of action in August 2014. "'A court has

inherent power by summary means to prevent an abuse of its process and peremptorily to dispose of sham causes of action.'" (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391.)

3. Third Cause of Action for Wrongful Constructive Termination

Ouyang alleged in her third cause of action that Achem harassed, retaliated against, and discriminated against her, forcing her to resign in November 2013. "The idea of 'constructive termination' is that working conditions are made so *intolerable* by the employer that the wronged employee is *forced* to quit." (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 213.) The court sustained Achem's demurrer, finding both that the cause of action was time-barred, and that Ouyang had failed to allege facts demonstrating that her work conditions "were so intolerable as to require a reasonable person to resign."

In her opening brief, Ouyang does not contend the court erred in finding that her cause of action failed to state facts constituting a cause of action because she failed to state facts demonstrating intolerable working conditions. She has thus forfeited any challenge to the court's determination of that issue. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [affirming summary adjudication where appellants challenged only one of multiple grounds on which adjudication was granted: "Generally, appellants forfeit or

abandon contentions of error regarding the dismissal of a cause of action by failing to raise or address the contentions in their briefs on appeal"].) We therefore need not address her argument that the court erred in finding this cause of action time-barred. (See, e.g., *Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1237, fn. 3 ["Since we uphold the trial court's ruling on the first basis for demurrer, we need not address this second argument"].)

In Ouyang's reply brief, she briefly argues that "Achem's illegal request to conceal material accounting misstatement when the headquarter[s] was about to issue corporate bonds to public and Achem's discriminatory practice of refusing wage increase because of national origin" were allegations of intolerable conditions. ""[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before."" (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1478.) "'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.'" (*Id.* at 1477.) Ouyang shows no good reason for failing to present these points in her opening brief. Even were we to consider them, we would find that these allegedly intolerable conditions occurred prior to her unpaid leave in January 2011, and therefore could not have been the cause of her resignation in November 2013.

B. *Motion for Judgment on the Pleadings*

Ouyang argues the court erred in granting Achem's motion for judgment on the pleadings for the same reason it erred in granting Achem's demurrer. We find the court did not err in granting the motion for judgment on the pleadings for the same reason it did not err in granting the demurrer.

C. *Trial Court's Failure to Rule on Estoppel Objection*

After Achem submitted a proposed judgment, Ouyang objected on the ground that Achem was estopped from asserting a statute of limitations defense. In June 2018, the court entered Achem's proposed judgment without substantive change, and without explicitly ruling on Ouyang's objections.

Ouyang argues the trial court erred by failing to rule on her estoppel objection to Achem's proposed judgment. We interpret the court's entry of judgment to be an implicit overruling of Ouyang's objections. Ouyang cites no authority requiring a court to issue an explicit ruling on a party's objections to a judgment. In any case, as discussed above, there is no merit to her estoppel objection.

D. *Court's Failure to Issue a Statement of Decision*

In Ouyang's objections to Achem's proposed judgment, she requested the trial court "issue a statement of decision explaining the factual and legal basis for its decision." The court issued no statement of decision. Ouyang argues she

was prejudiced by the failure to issue a statement of decision because, without it, she cannot show how the trial court erred in entering judgment.

Code of Civil Procedure section 632 provides in pertinent part: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . . The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision."

Because there was no trial of fact, no statement of decision was required. (See *Wadler v. Justice Court of Merced Judicial Dist.* (1956) 144 Cal.App.2d 739, 744 [statement of decision under Code of Civil Procedure section 632 unnecessary "where no issue of fact is decided"]; *Rebmann v. Rohde* (2011) 196 Cal.App.4th 1283, 1294 ["By using the word 'trial' in the statute, the Legislature intended that a statement of decision is available only when the court conducts a *trial*"].) Further, Ouyang's request for a statement of decision did not specify the controverted issues as to which she was requesting a statement of decision. Ouyang cites no authority requiring the court to issue a statement of decision in such a situation.

Moreover, our review of the court's sustaining of a demurrer is de novo. Even had Ouyang been entitled to a

statement of decision, she could show no prejudice from the lack of one, and thus would not be entitled to reversal. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 ["a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review"].)

E. *Sanctions Under Code of Civil Procedure Section 128.5*

"A trial court may order a party . . . to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) "'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (*Id.* at § 128.5, subd. (b)(2).) "On appeal from a denial of a request for sanctions pursuant to Code of Civil Procedure section 128.5 we presume the order of the trial court is correct, and the standard of review is abuse of discretion." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) ""'Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: '*An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge*. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting

from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . .""" (*Ibid.*)

Ouyang filed a motion for sanctions under Code of Civil Procedure section 128.5, alleging Achem's motion for leave to file a cross-complaint was frivolous. The court denied the motion, finding that while the cross-complaint was unnecessary, "it was not filed entirely without purpose." The court additionally pointed out that it had granted the motion for leave to file the cross-complaint, and it would be wrong to sanction Achem for a motion the court had granted. On appeal, Ouyang argues the court abused its discretion in denying her sanctions motion because the clear intent of Achem's motion was to obtain Ouyang's "exempt property," which was "totally and completely without merit . . . ."

When Achem moved to file a cross-complaint, the court had already sustained a demurrer without leave to amend to Ouyang's first four causes of action, leaving only the fifth and sixth causes of action. Code of Civil Procedure section 704.140 provides that "an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." (Code Civ. Proc., § 704.140, subd. (b).) Ouyang's fifth cause of action for fraud sought monetary damages to reimburse her for medical expenses she incurred due to Achem's alleged misrepresentation that it would pay for her medical insurance, as well as compensation for "sever[e] emotional distress." Her sixth cause of action for breach of contract

sought monetary damages for the same out-of-pocket medical expenses. While severe emotional distress may constitute personal injury (see *Sylvester v. Hafif (In re Sylvester)* (9th Cir. BAP 1998) 220 B.R. 89, 92), Ouyang presents no authority that a claim for expenses is one arising out of "personal injury." Further, though Ouyang claimed to be indigent and had received a fee waiver, she did not demonstrate how any amount she would receive for severe emotional distress would be necessary to support her. In short, she did not show the motion was without merit, much less frivolous. Moreover, as the court itself observed, it had granted Achem's motion. The court's sensible decision to decline to sanction Achem for filing a motion the court had expressly granted was not "a manifest miscarriage of justice."

F. *Offset*

Ouyang argues the court erred in denying her motion to strike Achem's affirmative defense for offset, because she claims any award received in this lawsuit would be exempt from collection. As explained above, it is far from clear that Achem would not be entitled to an offset. In any case, given that her entire action has been disposed of, this argument is moot.

G. *Reconsideration of Our Previous Order*

In August 2017, in *Achem Indus. Am., Inc. v. Superior Court* (Aug. 16, 2017, B282801) [nonpub. opn.], we ordered the trial court to grant Achem's motion for summary

judgment on Ouyang's fifth and sixth causes of action, because they were preempted by ERISA. We also awarded Achem its costs on appeal. Ouyang argues that "in the interest of justice," we should revisit both our orders that the trial court grant summary judgment, and the award of costs. Ouyang petitioned for rehearing of our opinion when it was initially issued, and we denied her petition. She then petitioned our Supreme Court for review, and it denied her petition. Our previous orders are final.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.